



BOARD OF INQUIRY (*Human Rights Code*)

Library

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Ena Drummond February 27, 1990, alleging discrimination in employment on the basis of sex, harassment and sexual solicitation.

B E T W E E N :

Ontario Human Rights Commission

- and -

Ena Drummond

Complainant

- and -

Tempo Paint and Varnish Co. (Division of Towers Chemical Ltd.),
Bernard Jakobson and Hugh Kerr

Respondents

INTERIM DECISION

Adjudicator : Katherine Laird

Date : March 6, 1997

Board File No: 93-0052

Decision No : 97-006-I

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission)	
)	Alan D'Silva, Counsel
)	

Ena Drummond)	
Complainant)	Roger Rowe, Counsel
)	

Tempo Paint and Varnish Co. (Division)	
of Towers Chemical Ltd.))	Israel Balter, Counsel
Corporate Respondent)	

Bernard Jacobsen)	
Hugh Kerr)	Israel Balter, Counsel
Personal Respondents)	

Introduction

This decision deals with a request by the Ontario Human Rights Commission and the Complainant for a temporary stay of the proceedings. The background to this request is outlined in my decision of May 8, 1996. On April 15, 1996, the Complainant was served outside our hearing room with criminal charges arising out of her testimony at the hearing. I was advised by the attending police officer that the Complainant had been charged with “attempt to obstruct justice” and “attempt to commit fraud in excess of \$5000”. The Commission immediately requested that the hearing be stayed.

I deferred consideration of the stay request until the Complainant could retain counsel. The hearing was adjourned for several months while the Complainant applied for legal aid. On September 10, 1996, the hearing was re-convened by conference call. At that time, counsel for the Complainant joined the Commission in seeking a stay. Counsel for the Respondents did not oppose the request. I declined to make the order sought and directed counsel to file written submissions on two questions: the appropriateness of a stay; and the compellability of the Complainant for further re-cross-examination. Unfortunately, it was necessary for counsel for the Respondents to request an extension of time, and the submissions were not complete until December 1996.

Submissions of the Parties

Human Rights Commission

The Commission submitted that a stay was necessary “to afford the Complainant her section 13 [*Canadian Charter of Rights and Freedoms*] protection against self-incrimination for any future testimony in this hearing”. Further, the Commission noted that “there is a risk that any factual findings made by the Board of Inquiry, including credibility findings, could have adverse implications on the Complainant in the criminal trial.”

On the question of whether the Complainant should be subjected to further re-cross-examination, the Commission argued that, pursuant to s. 11(c) of the *Charter*, the Complainant could not be compelled to give evidence that could be used against her in the criminal proceedings. Two

decisions of the Supreme Court of Canada were cited in support: *British Columbia Securities Commission v. Branch* (1995), 97 C.C.C. (3d) 505 (S.C.C.); *Batary v. Attorney-General for Saskatchewan* (1965), 52 D.L.R. (2d) 125 (S.C.C.).

Finally, the Commission took the position that, quite apart from the issue of compellability, I should exercise my authority to limit further re-cross-examination of the Complainant pursuant to s. 23(1) and (2) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended. It was submitted that the Complainant had already been cross-examined thoroughly with respect to all issues, including the alleged inconsistencies in her testimony.

The Complainant

Counsel for the Complainant advised that he had contacted the lawyer representing his client on the criminal charges and that the criminal proceedings were still in the pre-trial stage. He confirmed that he had been advised that the charges stemmed from alleged inconsistencies between the Complainant's testimony at the Board of Inquiry and her testimony in an examination for discovery in an unrelated civil proceeding.

On the issues of compellability and the appropriateness of a stay, the submissions on behalf of the Complainant supported those of the Commission. Counsel argued that, given that the Complainant was arguably exempt from the protection of s. 13 of the *Charter*, there was a danger of "extreme prejudice" to her criminal defence should the Board of Inquiry hearing resume. Relying on the decision of the Supreme Court of Canada in *Starr v. Holder*, [1990] 1 S.C.R. 1366, it was submitted that the hearing should be stayed because further testimony by the Complainant could be used against her in the criminal trial.

The Respondents

Counsel for the Respondents stated that his clients were taking no position on the question of whether or not the Board of Inquiry hearing should be stayed. However, he did bring to my attention the case of *Belanger v. Caughell* (1995), 22 O.R. (3d) 741 in which the Ontario Court (General Division) refused to stay a civil proceeding to prevent examination for discovery of a defendant who

was charged criminally in respect of the same factual circumstances. Counsel noted that the Court had relied on the fact that the civil proceeding was not initiated by the government and had a purpose separate and apart from the criminal process, specifically the recovery of damages.

On the question of the compellability of the Complainant for further re-cross-examination, the Respondents made extensive submissions. Counsel took the position that s. 11(c) of the *Charter* was of no assistance given that the Board of Inquiry hearing was initiated by the Complainant to seek a remedy in respect of circumstances unrelated to the criminal charges. Counsel distinguished the cases relied upon by the Commission and the Complainant as involving government-initiated inquiries examining the very issues to be considered in criminal proceedings. Relying on s. 9(1) of the *Ontario Evidence Act*, R.S.O. c.E-23, as amended, counsel submitted that a witness could not refuse to answer a question that might tend to criminate him/her. Counsel argued that it would be a denial of natural justice for the Respondents not to be allowed to complete their re-cross-examination.

Decision

I accept the submissions of counsel for the Commission and for the Complainant that s. 13 of the *Charter* may not provide protection against self-incrimination in this case. However, I do not agree that s. 11(c) of the *Charter* has application to the facts of this case. Section 11 provides:

Any person charged with an offence has the right ... (c) not to be compelled to be a witness in proceedings against that person in respect of the offence ...

This Board of Inquiry hearing cannot be considered a proceeding “against” the Complainant; on the contrary, this is a proceeding commenced by the Complainant. Further, this hearing is not a proceeding “in respect of the offence”. In fact, the hearing before me concerns an entirely different question, namely whether or not the Respondents infringed the rights of the Complainant under the *Code*. The *Batary* and *Starr* decisions, relied upon by the Commission and the Complainant, can both be distinguished.

I find that the Complainant is a compellable witness before the Board of Inquiry in the event that I allow further re-cross-examination. It is for the judge in the criminal proceeding to decide whether or not the Complainant's answers in any subsequent re-cross-examination are admissible in that proceeding, in light of s. 13 of the *Charter* and s. 5 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, as amended. It is not appropriate for this Board to attempt to pre-empt that determination by the Court or to stay this hearing in order to protect the Complainant against possible self-incrimination. On the contrary, it is my task to bring this hearing to a full and final resolution in as timely a manner as possible, consistent with principles of procedural fairness. Due to the many difficult circumstances of this case, it has not been possible to move the hearing forward within the usual timeframes. A further delay in the proceedings has not been justified. The hearing will be continued on dates to be set by the Registrar of the Board of Inquiry.

Having determined that the hearing will not be stayed and that the Complainant is compellable, it is necessary to consider the appropriateness of further re-cross-examination. By oral ruling on October 23, 1995, the Respondents were permitted to re-cross-examine the Complainant in three areas: her employment history after termination by the corporate Respondent; her job search after an accident involving the Toronto Transit Commission; and her mental distress after the alleged sexual harassment, including the impact of the subsequent accident. Re-cross-examination was conducted on November 15, 1995, and numerous questions were asked of the Complainant in each of these areas. The re-cross-examination was to be completed on November 27, 1995, but the Complainant did not attend on that date, apparently due to ill health. In the absence of the Complainant, counsel for the Respondents proceeded with other witnesses on that day and on December 11th, at which point the Commission advised me that the Complainant had lost her housing, had no address or telephone number, and could not be located. The hearing was adjourned.

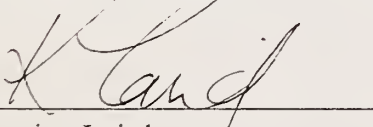
On January 9, 1996, the hearing was re-convened by conference call. At that time, the Commission was able to agree to hearing dates during the week of April 15, 1996, in the expectation that the Complainant would be attending. The Complainant did attend at the Board's offices on April 15, but did not enter the hearing room after having been served with the criminal charges in the hallway outside the hearing room.

The ability to re-cross-examine a witness is a matter fully within the discretion of the adjudicator. In this case, the Respondents were permitted to re-cross-examine the Complainant in three areas which could be relevant to the assessment of damages if a finding of discrimination is made. Counsel for the Respondents concedes in his submission that "the purpose of completing the cross-examination ... is to probe the issue of damages arising from the Complainant's contention that she was a victim of discrimination and harassment"[emphasis added]. It is significant that it is the truthfulness of the Complainant's evidence with respect to damages which is also apparently at issue in the criminal proceedings.

Given the fact that the purpose of the re-cross-examination is to probe the issue of damages, it is not necessary that any further questioning precede the completion of the Respondents' case on the primary issue before this Board, namely the question of whether or not the Complainant's rights under the *Code* have been infringed. Indeed, counsel for the Respondents has already proceeded with several witnesses since the re-cross-examination was interrupted. I direct counsel to proceed with the remaining witnesses on the hearing days to be scheduled.

Following completion of the respondents' case, and any reply evidence, I will consider, if asked to do so, whether it is appropriate to allow further re-cross-examination on the issues related to damages. At that time, the parties can make submissions as to whether this is an appropriate case for the exercise of my discretion to limit further examination of a witness under s. 23(2) of the *Statutory Powers Procedures Act*. It may be that the criminal proceedings will have concluded by that time. In any event, there appears to be little likelihood that a final decision in this matter will be released prior to disposition of the criminal charges which have been outstanding since April 1996. This should address the concerns of the counsel for the Commission and the Complainant that my findings on credibility could prejudice the Complainant in the criminal proceeding.

Dated at Toronto this 6th day of March, 1997.

A handwritten signature in dark ink, appearing to read "K. Laird", is written over a horizontal line.

Katherine Laird
Member, Board of Inquiry

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a very important document, as it sets out the President's policy for the new year.

2. The second part of the document is a report from the Secretary of the Treasury, dated January 1, 1861. It contains a detailed account of the financial state of the country at the beginning of the year.

3. The third part of the document is a report from the Secretary of the Interior, dated January 1, 1861. It contains a detailed account of the state of the interior of the country at the beginning of the year.

4. The fourth part of the document is a report from the Secretary of the Navy, dated January 1, 1861. It contains a detailed account of the state of the Navy at the beginning of the year.

5. The fifth part of the document is a report from the Secretary of the War, dated January 1, 1861. It contains a detailed account of the state of the War at the beginning of the year.

6. The sixth part of the document is a report from the Secretary of the State, dated January 1, 1861. It contains a detailed account of the state of the State at the beginning of the year.

7. The seventh part of the document is a report from the Secretary of the War, dated January 1, 1861. It contains a detailed account of the state of the War at the beginning of the year.

8. The eighth part of the document is a report from the Secretary of the Navy, dated January 1, 1861. It contains a detailed account of the state of the Navy at the beginning of the year.

9. The ninth part of the document is a report from the Secretary of the Interior, dated January 1, 1861. It contains a detailed account of the state of the interior of the country at the beginning of the year.

10. The tenth part of the document is a report from the Secretary of the Treasury, dated January 1, 1861. It contains a detailed account of the financial state of the country at the beginning of the year.

11. The eleventh part of the document is a report from the Secretary of the State, dated January 1, 1861. It contains a detailed account of the state of the State at the beginning of the year.

12. The twelfth part of the document is a report from the Secretary of the War, dated January 1, 1861. It contains a detailed account of the state of the War at the beginning of the year.

13. The thirteenth part of the document is a report from the Secretary of the Navy, dated January 1, 1861. It contains a detailed account of the state of the Navy at the beginning of the year.

14. The fourteenth part of the document is a report from the Secretary of the Interior, dated January 1, 1861. It contains a detailed account of the state of the interior of the country at the beginning of the year.

15. The fifteenth part of the document is a report from the Secretary of the Treasury, dated January 1, 1861. It contains a detailed account of the financial state of the country at the beginning of the year.